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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 849.

~~Miscellaneous Docket.~~

FRANK CUIKSA, *Petitioner,*

v.

THE CITY OF MANSFIELD, *et al., Respondents.*

CLARK DENNY HERTZLER, *Petitioner,*

v.

THE CITY OF MANSFIELD and
GLEN W. MARRIOTT, *Respondents.*

FRANK L. SMITH, *Petitioner,*

v.

THE VILLAGE OF BUTLER, ROBERT E. HARRIS and
RONALD THOMPSON, *Respondents.*

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

FRED O. BURKHALTER,
LESLIE R. ULRICH,
ROBERT F. LEE,
1425 National City Bank Bldg.,
Cleveland 14, Ohio,

RICHARD M. CHRISTIANSEN,
16 North Mulberry Street,
Mansfield, Ohio,

LYDON H. BEAM,
Richland Trust Bldg.,
Mansfield, Ohio,
Attorneys for Respondents.

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RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The questions presented by these three petitions for certiorari is whether Congress intended to abrogate the ancient doctrines of judicial and governmental immunity in suits for damages under the Civil Rights Acts. The statute involved is 42 U. S. C. 1983, which was formerly 8 U. S. C. 43 and derived from the Act of April 20, 1871.

The three actions were filed in the United States Dis-

trict Court for the Northern District of Ohio. Each of the actions was brought against an Ohio municipal corporation, a judge of its municipal court and one or more of its police officers. Motions for summary judgments under Rule 56 were filed in each of the three cases on behalf of the municipality and of the defendant judge and in the Smith case on behalf of the constable. No motion for summary judgment was filed on behalf of any of the police officers in the Cuiksa and Hertzler cases; and the cases are still pending in the District Court as to these defendants. The motions were each based upon the ground that there was no genuine issue as to any material fact in the action as appeared from the pleadings and the plaintiff's deposition.*

The District Court granted all of the motions for summary judgment. This eliminated the City of Mansfield and the judge of the Municipal Court of Mansfield as defendants in the Cuiksa and Hertzler cases. Such rulings eliminated all three of the defendants in the Smith case, namely the Mayor of the Village of Butler, who is *ex officio* judge of its Mayor's Court, the Village of Butler and the village constable.

Upon appeal by the plaintiffs, the Sixth Circuit Court affirmed the judgments of dismissal in all three cases, regarding *Tenney v. Brandhove*, 341 U. S. 367 and its own decision in *Kenney v. Fox*, 6th Cir., 232 F. 2d 288, cert. den. in 352 U. S. 855, 856, as decisive.

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*The appellant has filed for its record herein its appendices to its briefs in the Sixth Circuit Court. The respective complaints and motions for summary judgment are printed therein at pages 3a and 15a of appellant's lower court appendix in the Cuiksa case, at page 3a of the Hertzler appendix and at pp. 3a and 9a of the Smith appendix.

The depositions of the plaintiffs in the Cuiksa and Hertzler cases disprove the claims of gross mistreatment made in their briefs herein.

The pertinent facts in the three cases may be summarized as follows:

Cuiksa Case, No. 13291.

Cuiksa was tried before a jury in the court of the defendant Judge Marriott of the Municipal Court of Mansfield upon an affidavit charging Cuiksa with "Disturbing the peace and good order of the City by drunken behavior" contrary to § 200 of the Ordinances of that City (pp. 4a, 5a of Cuiksa appendix). Cuiksa was convicted, fined $50.00 and appealed first to the Common Pleas Court and then to the Ohio Court of Appeals, each of which affirmed his conviction.

In October, 1953, Cuiksa brought the instant action in the District Court at Cleveland under the Civil Rights Act asking for $250,000 damages and unique other relief, such as furnishing the appellant "a sanitary prison" (he received no jail sentence) and vacating the state court conviction (7a-8a).

Hertzler Case, No. 13220.

Hertzler was tried before a jury in the court of the defendant Judge Marriott of the Municipal Court of Mansfield for disorderly conduct and resisting a police officer. The affidavits are set forth in the complaint. The jury found Hertzler not guilty on the first charge and guilty on the second. Hertzler appealed the conviction to the Common Pleas Court which reversed the conviction. Thereafter, upon a further appeal by the State, the Ohio

Court of Appeals set aside the reversal and remanded the case to the Common Pleas Court to pass upon additional grounds of error. The Common Pleas Court then overruled all of the assignments of error and Hertzler again appealed to the Court of Appeals which affirmed the conviction. Thereafter, Hertzler filed an appeal as of right and a motion to certify the record in the Supreme Court of Ohio. The appeal was dismissed and the motion to certify was overruled on December 18, 1957, Case No. 35395, decided two days before the decision herein of the lower court.

In October 1953 Hertzler filed this action in the District Court at Cleveland under the Civil Rights Act, praying for $250,000 in damages and that the state court criminal proceedings be set aside by the Federal court.

Smith Case, No. 13228.

Smith was tried in the Mayor's Court of the Village of Butler upon an affidavit filed by the defendant Thompson which charged that Smith "unlawfully passed said Ronald Thompson on the right hand side at the intersection of Main and Elm Street, State Route 97 and 95" on October 8, 1952. Section 6309-27(a) of the Ohio General Code (now § 4511.27, Ohio Rev. Code) made it unlawful for the operator of a motor vehicle to overtake and pass another vehicle on the right, as Smith had done. The affidavit thus charged Smith with doing what was an offense under the Ohio statutes.

Many Ohio municipalities enact traffic ordinances which are local counterparts of State traffic statutes.

The defendant Mayor Harris, mistakenly believing that the Village of Butler had a local counterpart of the state passing-on-the-right statute, found Smith guilty of the

offense but entered the conviction as one under a village ordinance. Thereafter, upon ascertaining that the village had no such ordinance, Mayor Harris promptly vacated the judgment of conviction under the ordinance but ordered Smith to appear on December 4, 1952 to answer a charge of violating the State statute. He further ordered Smith to enter into a recognizance of $25.00 for his appearance. He advised Smith's counsel that, to accommodate them, he would consider the fine of $20.00 and costs of $4.10 as a recognizance but to inform him if the attorney desired otherwise.

Nothing further has ever happened in the case and the conviction remains set aside.

In October, 1953, Smith brought the instant action in the District Court at Cleveland under the Civil Rights Act, asking for $200,000 damages.

ARGUMENT.

The decision of the Court in *Tenney v. Brandhove*, 341 U. S. 367, has been regarded by all of the Circuit Courts passing upon the question as being decisive against the petitioners' contention that Congress intended to abrogate judicial and governmental immunity in suits for damages under the Civil Rights Act, 42 U. S. Code 1983. In the *Tenney* case, the Court held that the aforesaid § 1983, then 8 U. S. C. 43, did not abrogate the doctrine of legislative immunity in the case of a committee of the California legislature. Mr. Justice Frankfurter stated (p. 376):

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National

> Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of §§ 1 and 2 of the 1871 statute—now §§ 43 and 47(3) of Title 8—were not spelled out in debate. We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."

Since the *Tenney* decision, the Circuit Courts passing upon the question have uniformly held that the doctrines of judicial immunity and governmental immunity are just as deep-rooted and essential as the doctrine of legislative immunity and were likewise not intended by Congress to be abrogated in suits under the Civil Rights Act. The First, Second, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have so held in the following cases:

First Circuit:

Francis v. Crafts, 1 Cir., 203 F. 2d 809, 811, cert. den. 346 U. S. 835;
Cobb v. City of Malden, 202 F. 2d 701;
Francis v. Lyman, 1 Cir., 216 F. 2d 583;
Handy Cafe v. Justices of the Superior Court, 1 Cir., 248 F. 2d 485.

Second Circuit:

Miller v. Director, Middletown State Hospital, 2 Cir., 243 F. 2d 527, aff'g. an opinion of lower court in 146 F. Supp. 674, S. D. N. Y.;

Morgan v. Sylvester, 2 Cir., 220 F. 2d 758, aff'g. 125 F. Supp. 380, cert. den. 350 U. S. 867.

Sixth Circuit:

Kenney v. Fox, 6 Cir., 232 F. 2d 288, cert. den., 352 U. S. 855 and 856;

Watson v. Skillman, 6 Cir., 234 F. 2d 659, cert. den., 352 U. S. 974;

Copley v. Sweet, 6 Cir., 234 F. 2d 660, cert. den., 352 U. S. 887;

Tankard v. O'Hara, 6 Cir., 234 F. 2d 661;

Grubbs v. Farnsley, 6 Cir., 234 F. 2d 666, cert. den., 352 U. S. 894;

Thomson v. Heither, 6 Cir., 235 F. 2d 176, appeal dismissed 352 U. S. 921;

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Seventh Circuit:

Cawley v. Warren, 7 Cir., 216 F. 2d 74;

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Eighth Circuit:

Tate v. Arnold, 8 Cir., 223 F. 2d 782;

Moffett v. Commerce Trust Co., 8 Cir., 187 F. 2d 242, cert. den. 342 U. S. 818, reh. den. in 342 U. S. 879, and 343 U. S. 989.

Ninth Circuit:

Holmes v. Henderson, 9 Cir., 249 F. 2d 529.

Tenth Circuit:

Ryan v. Scoggin, 10 Cir., 245 F. 2d 54.

We know of no pertinent decision in the Fourth or Fifth Circuits.

Appellants state that the decision of the Sixth Circuit Court herein is in conflict with the decision of the Third Circuit in *Picking v. Penn. R. Co.*, 3 Cir., 151 F. 2d 240, wherein the court took the view that Congress had intended to abrogate judicial immunity in Civil Rights Act suits. However, the *Picking* case, upon which the petitioners evidently relied when they filed the instant cases, was decided prior to the *Tenney* decision. Two other Circuit Courts have expressed doubt that the *Picking* construction is binding any longer in the Third Circuit, *Francis v. Crafts*, 1 Cir., 203 F. 2d 809, at 812, and *Tate v. Arnold*, 8 Cir., 223 F. 2d 782, at 785. The latter case points out, with citations from District Courts in the Third Circuit, that such District Courts have held "that the decision in the *Picking* case is no longer binding on that circuit." (223 F. 2d, at 785). The Third Circuit Court has itself twice declined opportunities to state whether it regarded its decision in the *Picking* case as overruled by *Tenney v. Brandhove*. These opportunities were in *Ginsburg v. Stern*, 3 Cir., 225 F. 2d 245 and 242 F. 2d 379, being suits for damages under the Civil Rights Act against the Chief Justice and the Associate Justices of the Supreme Court of Pennsylvania. In each instance, however, the Third Circuit Court, sitting in banc, expressly refrained from passing upon the question.

The point we make from the above citations is that the decision of the Sixth Circuit Court herein is in harmony with the decision of this Court in *Tenney v. Brandhove* and is not in conflict, within the meaning of Rule 19(b) of this Court, with the decision of any other Court of Appeals on the same matter, as suggested by the petitioners.

The scope of the doctrine of judicial immunity is well established by decisions of this Court. *Bradley v. Fisher*, 13 Wall. 335, 347; *Alzua v. Johnson*, 231 U. S. 106, 111. See also *Yaselli v. Goff*, 2 Cir., 12 F. 2d 396, aff'd. in 275 U. S. 503 on the authority of *Bradley v. Fisher, supra* and *Alzua v. Johnson, supra*.

The doctrine of judicial immunity has been applied to judges at all levels of the judicial system. 30A *Amer. Jur.* 43-44, Judges, § 74. In *Voll v. Steele*, 141 O. S. 293, 302, it was held that a mayor who by the Ohio statutes is judge of the Mayor's court of the village (§ 4527, Ohio Gen. Code) was "within the protection of his judicial position" and "is protected against the charge of false arrest."

The Municipal Court of Mansfield clearly had jurisdiction over the charges made against Cuiksa and Hertzler. It was provided at that time by § 1579-989, Ohio General Code, as follows:

> "*Sec. 1579-989. Jurisdiction of misdemeanors and felonies.* The municipal court [of Mansfield] shall have jurisdiction of all misdemeanors committed within the county of Richland, and all violations of the city ordinances within the city of Mansfield, of which police courts in municipalities or justices of the peace now have or may hereafter be given jurisdiction. * * *"

Likewise, in the Smith case, the Mayor of the Village of Butler had jurisdiction to try Smith for the offense of

passing on the right, whether as a violation of an ordinance or of a statute. Secs. 4535 and 4536 of the Ohio General Code then provided as follows:

> "§ 4535. *Final jurisdiction under ordinances; keeping dockets and files.* In villages, the mayor shall have final jurisdiction to hear and determine any prosecution for the violation of an ordinance of the corporation. * * *"
>
> "§ 4536. *Jurisdiction in certain state offenses; keeping dockets and files.* He [the mayor of a village] shall have final jurisdiction to hear and determine any prosecution for a misdemeanor unless the accused is, by the constitution, entitled to a trial by jury. * * *"

Thus, the charges upon which Cuiksa and Hertzler were tried in the Municipal Court of Mansfield and Smith in the Mayor's Court of the Village of Butler were within the jurisdiction of judges of those courts respectively.

It is our understanding that petitioners are contending only that as a matter of *statutory construction* the doctrine of judicial immunity is not available as a defense in a Civil Rights Act suit. We do not understand that they are contending that judicial immunity, if available as a matter of statutory construction, would for any reason peculiar to these cases not be a complete defense to the judges herein.

The rule of judicial immunity has not been avoided by the willingness of the petitioners to plead in each case, as they did, that the acts of the defendants "were wilful and malicious." In *Bradley v. Fisher*, 80 U. S. (13 Wall.) 335, Mr. Justice Field stated (p. 354):

> "The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether

the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed. 13 Wall. 354, 80 U. S. 354."

In the Smith case, the fact that the Mayor undertook to proceed to trial on the affidavit as if the offense were charged under an ordinance, which was nonexistent, instead of under the statute making such act an offense, did not deprive the Mayor of judicial immunity. On this point, in *Bradley v. Fisher, supra*, it was stated (p. 352):

"But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, * * * no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked * * *. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons."

In the Smith case, the fact that Smith appeared in Mayor Harris' court without a warrant, did not deprive

the Mayor's court of jurisdiction to try Smith. 14 *Am. Jur.* 920, Criminal Law, § 219; *Commonwealth v. Gorman*, 288 Mass. 294, 192 N. E. 618, 96 A. L. R. 977; *State v. Malvern*, 32 Wash. 7, 72 Pac. 489.

Judicial immunity is therefore a complete defense to the charges made by petitioners against the judge defendants.

So far as concerns the defendant constable in the Smith case, Thompson, the only charges made against him are that he filed the affidavit upon which Smith was tried and that he testified as a witness at the trial. Obviously such acts are within the scope of the judicial immunity doctrine and entitled to the same protection. Certainly Thompson did not "deprive" Smith "under color of law" of any right secured to Smith by the Federal Constitution when he filed an affidavit charging Smith with the commission of a traffic offense. Nor is he responsible for any subsequent error made by the judge of the court.

The reasoning in *Tenney v. Brandhove*, 341 U. S. 367, sustaining the doctrine of legislative immunity under the Civil Rights Act, is equally applicable to the preservation under the Civil Rights Act of the doctrine of governmental immunity. Four decisions by the Circuit Courts have so held, namely:

Cobb v. City of Malden, 1 Cir., 202 F. 2d 701, 703;
Hewitt v. City of Jacksonville, 5 Cir., 188 F. 2d 423, 424, cert. den. 342 U. S. 835;
Charlton v. City of Hialeah, 5 Cir., 188 F. 2d 421;
Agnew v. City of Compton, 9 Cir., 239 F. 2d 226, 230.

The doctrine of governmental immunity covers everything charged by the petitioners against the City of Mans-

field and the Village of Butler. See 38 *Am. Jur.* 316-319, Municipal Corporations, Secs. 618-620.

The existence of the doctrine of governmental immunity of municipal corporations in Ohio was reaffirmed in *Aldrich v. City of Youngstown*, 106 O. S. 342 and is reaffirmed in Sec. 3714-1, Ohio General Code, now Sec. 701.02, Ohio Revised Code.

CONCLUSION.

Cuiksa appealed his conviction to the Common Pleas Court and then to the Ohio Court of Appeals where it was affirmed. Hertzler's appeal was passed on twice by the Common Pleas Court, twice by the Ohio Court of Appeals and the Ohio Supreme Court denied his motion to certify and his appeal as of right. Smith's conviction was vacated by the Mayor's Court promptly upon ascertaining that the offense, although covered by an Ohio statute, was not covered by an ordinance as had been supposed. Clearly, none of the petitioners was denied due process of law.

In *Gryger v. Burke*, 334 U. S. 728, Mr. Justice Jackson stated (p. 731):

> "We cannot treat a mere error of state law, if one occurred as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."

As the court well stated in *Smith v. Lansing*, 7 Cir., 241 F. 2d 856 at 859:

> "If the plaintiff is entitled to maintain this suit in the Federal Courts, the doors will be open for every unsuccessful litigant in State Court proceedings to demand that the Federal Courts be arbiters of the correctness of State Court decisions and judgments."

We submit that the petition for certiorari should be denied.

Respectfully submitted,

FRED O. BURKHALTER,
LESLIE R. ULRICH,
ROBERT F. LEE,
1425 National City Bank Bldg.,
Cleveland 14, Ohio,

RICHARD M. CHRISTIANSEN,
16 North Mulberry Street,
Mansfield, Ohio,

LYDON H. BEAM,
Richland Trust Bldg.,
Mansfield, Ohio,
Attorneys for Respondents.